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October 7, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 03-189

Dear Ms. Dortch:

Attached please find the Reply Comments of the Save American Free Enterprise in Telecommunications (SAFE-T) Joint Commenters in the above-referenced proceeding, pursuant to the Commission's Public Notice (DA 03-2679, rel. August 18, 2003) and Order extending the due date for reply comments (DA 03-3007, rel. Sept. 30, 2003).

As the Public Notice recognized, the instant Petition in this proceeding seeks identical relief to that sought by the Verizon Telephone Companies in WC Docket No. 03-157. Indeed, the instant Petition merely parrots the Verizon petition, to the extreme degree that nine of the thirteen footnotes in this 5-page petition are mere citations to the Verizon petition. In recognition of this fact, our Joint Reply Comments in WC Docket No. 03-157, filed on September 2, 2003, addressed the instant petition. Similarly, the other initial comments in the instant proceeding mirror those filed in response to the Verizon petition. Accordingly, and as provided in the Public Notice, we hereby attach and incorporate by reference the Joint Reply Comments of these parties in WC Docket 03-157.

Kindly address any correspondence concerning these Joint Reply Comments to the undersigned counsel.

Very truly yours,

DAVIS WRIGHT TREMAINE LLP

/S/

James M. Smith

Enclosure

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Verizon Telephone Companies)	
)	WC Docket No. 03-157
Petition for Forbearance From the)	
Current Pricing Rules for the)	
Unbundled Network Element Platform)	
)	
)	

**JOINT REPLY COMMENTS IN OPPOSITION TO PETITIONS
FOR EXPEDITED FORBEARANCE**

A+ American Discount Telecom, LLC
ACCTion Communications
AmeritelUSA, Inc.
Anew Telecommunications Corporation d/b/a Call America
Bullseye Telecom, Inc.
International Telnet, Inc.
Liberty Phones Inc.
NTS Communications
Peak Communications, Inc.
Ring Connections
United Communications, Inc. d/b/a UNICOM
USA Telephone, Inc.
Utilities Commission of New Smyrna Beach, Florida

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September 2, 2003

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
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Verizon Telephone Companies)	
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FOR EXPEDITED FORBEARANCE**

A+ American Discount Telecom, LLC, ACction Communications, AmeritelUSA, Inc.,
Anew Telecommunications Corporation d/b/a Call America, Bullseye Telecom, Inc.,
International Telnet, Inc., Liberty Phones Inc., NTS Communications, Peak Communications,
Inc., Ring Connections, United Communications, Inc. d/b/a UNICOM, USA Telephone, Inc.,
and the Utilities Commission of New Smyrna Beach, Florida (collectively the “Joint
Commenters”), hereby submit their Joint Reply Comments in the above-captioned proceeding.¹
Joint Commenters are members of the Save American Free Enterprise in Telecommunications
Coalition (“SAFE-T”), which has been created to provide competitive local exchange carriers
(“CLECs”) with an economical and effective means to represent their interests in regulatory
proceedings and before legislators where the continued availability of basic rights and access to
critical resources in the possession of incumbent local exchange carriers (“ILECs”) granted them
under the Telecommunications Act of 1996 is in question.

¹ International Telnet, Peak Communications, Ring Connections and USA Telephone did not participate in the initial comments filed by Joint Commenters on August 18, 2003.

I. INTRODUCTION AND SUMMARY

The initial comments in this proceeding illuminate two essential truths concerning the Verizon and joint RBOC pleas that the Commission precipitously jettison both the TELRIC pricing methodology and, in essence, the “UNE-P” method of local exchange competition itself: (1) That, except for the RBOCs (and one other ILEC) themselves, the entire commenting telecommunications sector – both government and industry – strongly opposes these petitions,² and (2) that the petitions have had the one salutary effect of exposing once and for all the nearly fanatical and wild-eyed obsession of the RBOCs when it comes to UNE-P. Like the obsessed Inspector Javert of Victor Hugo’s “Les Miserables,” they are headlong in pursuit of their goal, irrespective of all facts or reason – to wit:

- Several Supreme Court and lower court holdings that squarely reject their arguments;
- A statute that mandates that which they decry and prohibits the relief they seek;
- Several recent Commission decisions and incipient proceedings which address the object of their obsession with the orderly fact-finding process they eschew;
- A local exchange market that finally exhibits some degree of competition, largely due to the entry vehicle they would abolish; and
- An American public that has responded strongly to and manifestly benefited from the competitive entry they denigrate.

At bottom, the Verizon and RBOC petitions are no more than diatribes that everyone else recognizes as such, and that the Commission should treat accordingly. To paraphrase the comments of SBC: “UNE-P is a Commission-created construct intended to facilitate market entry by CLECs”³ – and we must put a stop to that! Or, as stated even more candidly by

² Twenty-eight commenters representing 62 parties opposed the Verizon petition, including five State Commissions as well as state consumer advocates and 52 industry competitors and associations. Only Qwest, SBC, USTA and ACS of Anchorage supported the Verizon petition.

³ Comments of SBC at 3.

Verizon’s Vice Chairman, “I would want to say, kill those little suckers!”⁴ Whether Mr. Babbio was referring to CLECs like these Joint Commenters, or to the UNEs that these CLECs have used to bring competition to local residential and business customers for the first time, these “little suckers” are responsible for significant consumer benefits that have been recognized by this Commission, State Commissions and the nation’s highest Court. Indeed, the Commission, in embarking upon its upcoming TELRIC review proceeding, and the State Commissions in resolving their UNE “impairment” proceedings pursuant to the Commission’s *Triennial Review Order*, would be well advised to ask themselves: If the RBOCs are this intent and desperate to extinguish this type of local competition, must it not be a good thing?

As AT&T correctly states in opening its comments: “Rarely has a request for Commission action come bearing so *many* obvious and fatal defects.”⁵ Indeed, Verizon appears to have expunged the memory of the Supreme Court case that it brought and lost scarcely a year ago – the one that proclaimed:

[A] policy promoting lower lease prices for expensive facilities unlikely to be duplicated reduces barriers to entry (particularly for smaller competitors) and puts competitors that can afford these wholesale prices (*but not the higher prices the incumbents would like to charge*) in a position to build their own versions of less expensive facilities that are sensibly duplicable.⁶

As the California Public Utilities Commission (CPUC) observed, the *Verizon* decision “puts to rest any credible challenge in the future regarding the cost methodology that the California [Commission] along with the FCC have used to set unbundled network element costs, *i.e.*, the TELRIC methodology.”⁷

⁴ See *TR Daily*, Jan. 7, 2003, *quoted in* Comments of AT&T at 2 and Att. B.

⁵ Comments of AT&T at 1 (emphasis in original).

⁶ *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 503, 122 S.Ct. 1646, 1668 n. 20 (2002).

⁷ Comments of CPUC at 9.

In the balance of these Joint Reply Comments, we briefly address the Verizon/RBOC arguments and point out why, as the CPUC states, they should – summarily and immediately – be put to rest.

II. THE FORBEARANCE STANDARD OF SECTION 10 OF THE ACT

As these Joint Commenters and many other parties demonstrated in their initial comments, the relief sought in the RBOC petitions is not only precluded under Sections 10(a) and (b) of the Telecommunications Act;⁸ it is in fact prohibited under Section 10(d), which commands flatly that “the Commission may not forbear from applying the requirements of section 251(c) ...”⁹

Indeed, as many commenters pointed out, the relief sought by the petitioners is clearly unavailable under the Act’s “forbearance” provision for another compelling reason: These are not petitions for forbearance at all; rather, the petitioners explicitly seek to substitute another cost methodology for the one they seek to abolish¹⁰ – and one that is prohibited under the Telecommunications Act to boot.¹¹ This kind of extraordinary relief simply is not available under the rubric of forbearance.

The “sub-arguments” mustered by the petitions to support their claim that forbearance under Section 10 is an appropriate remedy for the various slings and arrows the RBOCs feel they have suffered under TELRIC and UNE-P are laid bare by the initial comments in this proceeding:

⁸ See, e.g., Joint Comments at 10-14; Comments of Sprint at 11-17; Z-Tel at 16-37.

⁹ 47 U.S.C. § 160(d). See Joint Comments at 7-10; Bridgecom at 7; CPUC at 12; AT&T at 23-24.

¹⁰ See, e.g., Comments of Z-Tel at 4-13; CompTel at 2-4; MCI at 2-3; AT&T at 3; PACE Coalition at 3-4; Covad at 1; Sprint at 5-8.

¹¹ See Comments of MCI at 4.

A. Section 10(d)'s Prohibition of Forbearance Is Fully Applicable

In response to the apparently fatal flaw in the RBOCs' pleas for forbearance from TELRIC and UNE-P – that Section 10(d) of the Act explicitly instructs that “the Commission may not forbear from applying the requirements of Section 251(c) ... until ... those requirements have been fully implemented”¹² – Verizon does no more than drop a footnote stating – entirely without support – that “neither TELRIC nor UNE-P are required by the Act” and that once an RBOC receives Section 271 authority in a state, Section 251(c) is somehow “fully implemented.”¹³

The initial comments lay both of these bare claims to rest. Our Joint Comments pointed out that the Commission's finding that TELRIC “is the approach for setting prices that best furthers the goals of the 1996 Act” was upheld by the Supreme Court in *Verizon*, and that the Commission also found that the conclusion that purchasers of UNEs may use them to offer exchange access services is “compelled by the plain language of ... section 251(c)(3).”¹⁴ And as MCI and AT&T point out, the Commission has explicitly found that the term “requirement” in Section 10(d) includes both “statutory provisions [and] the regulations implementing those provisions.”¹⁵

The argument that Section 251(c)(3) is “fully implemented” by dint of the fact that the RBOCs have obtained Section 271 long-distance authority in most states is, as we pointed out in the Joint Comments, absurd on its face.¹⁶ The initial comments of many other parties, including

¹² 47 U.S.C. § 160(d).

¹³ Verizon petition at n. 38.

¹⁴ Joint Comments at 8-9, quoting *Local Competition Order*, 11 FCC Rcd 15499, ¶¶ 356, 620 (1996) and *Verizon v. FCC*, 122 S.Ct. 1646, 1661 (2002).

¹⁵ See MCI Comments at 21, quoting *1998 Biennial Review*, Notice of Inquiry, 13 FCC Rcd 21879 at ¶ 32 (1998). See also AT&T Comments at 23-24.

¹⁶ See Joint Comments at 7 and n. 12.

states, leave no doubt that the critical ongoing requirements of Section 251(c) are far from “fully implemented.”¹⁷

B. Forbearance is Precluded Under Section 10 Because It Would Harm Consumers and Competition, Including Facilities-Based Competition

The initial comments confirm that, far from “not [being] necessary for the protection of consumers,”¹⁸ the forbearance sought by petitions would grievously harm consumers. The Verizon petition audaciously claims that “forbearance will affirmatively further consumer interests by encouraging the development of facilities-based competition and by promoting the kind of innovation and meaningful consumer choice that only ‘real’ . . . competition can produce.”¹⁹ As our Joint Comments pointed out, the Supreme Court in *Verizon* found that Verizon’s alternatives to TELRIC would result in “higher retail prices consumers would have to pay,” and the recent Illinois district court in *Voices for Choices* recognized that SBC’s assault on TELRIC “means less choices for consumers, and less choices for consumers ultimately leads to higher prices.”²⁰ NASUCA states succinctly that “the TELRIC standard for UNE-P is necessary for the protection of the consumers who have taken the competitive opportunities offered by UNE-P carriers,” and meets the lead petitioner’s arguments head-on:

Verizon would have this Commission forbear from requiring incumbents to provide the combination of network elements that is the source of most residential competition in this country, based on the forward-looking cost standard upheld by the United States Supreme Court. Verizon has presented no shred of credible evidence to meet the statutory requirements for forbearance.²¹

¹⁷ See, e.g., Comments of CPUC at 12; Z-Tel at 16; PACE Coalition at 6-7; Telscape at 3; Sage Telecom and Talk America at 3-5; Sprint at 17.

¹⁸ 47 U.S.C. § 160(a)(2).

¹⁹ Verizon petition at 20. It is noteworthy that in citing facilities-based carrier support for its claims, Verizon can do no better than to cite a 2 ½ year old *ex parte* letter by a single CLEC. See *id.* at n. 25 and Att. B at n. 150.

²⁰ Joint Comments at 12, quoting *Verizon*, 122 S.Ct. at 1673; *Voices for Choices v. Illinois Bell Telephone*, No. 03-C-3290 (N.D. Ill. June 9, 2003), slip op. at 17.

²¹ NASUCA Comments at 17, 19.

Indeed, the petitioners find utterly no support even from the facilities-based competitors they presume to “defend” in seeking forbearance. On the contrary, the commenting facilities-based CLECs universally oppose the disingenuous “helping hand” offered by petitioners. As Logix explains:

Every CLEC needs access to a number of methods to provide service to customers if those providers can expect to compete with incumbents and have the flexibility to service the telecommunications needs of a diverse customer base. Logix, for example, uses its own Class 5 switches to service its customers ... Yet, even Logix requires the ubiquitous coverage that UNE-P provides to be competitive ... If the FCC allowed Verizon to wall off a large set of customers, the ability of Logix and other carriers to effectively compete will be in doubt.²²

Petitioners studiously ignored the Supreme Court’s finding only last year that the argument that TELRIC pricing disincentivizes capital investment and facilities-based competition “founders on fact.”²³ They will doubtless now also ignore the affirmation of Focal, McLeod, PacWest Telecomm and TDS Metrocom that they, “who are facilities based CLECs that access capital markets, decide where to deploy facilities and compete head-to-head with a monopolist, can attest that Verizon’s contentions about TELRIC discouraging investment are counter to fact.”²⁴

Indeed, the petitioners, apparently intentionally (since, as CompTel observes, Verizon itself is now the nation’s third-largest IXC, largely enabled by its resale or leasing of interLATA facilities²⁵), ignore the lessons of both the past and the present that instruct that facilities leasing is often a necessary prerequisite and an historical precursor to the development of greater degrees of facilities competition. As TexAHTel notes:

Once in the market, CLECs will begin to build a customer base and increase revenue. Next, CLECs will begin searching for innovative technology to combine with [their]

²² Comments of Logix at 5-6.

²³ *Verizon*, 122 S.Ct. at 1675.

²⁴ Comments of Focal, McLeod, PacWest and TDS at 18 n. 54.

²⁵ See CompTel Comments at 11.

current service provisioning to distinguish themselves from the pack – to offer newer services or to reduce their costs. It is important to note that the natural evolution of the industry provides for facilities investment as the last piece of the puzzle, not the first. Facilities investment is the mark of solid companies with customers, revenue and solid business plans. ***We cannot repeat this refrain often enough, sound economic practice requires a competitor to have a strong customer base [and] thus revenues before it can invest in a capital-intensive network.***²⁶

As if to add a current, factual exclamation point to this reality, Telscape reports that “Telscape’s operations themselves are further evidence of the fact that the availability of UNE-P complements infrastructure investment: Telscape serves approximately 65% of its customer base over its own facilities, utilizing UNE-P to acquire customers only where Telscape facilities are not available.”²⁷

III. PETITIONERS’ INVOCATION OF THE FORBEARANCE PROVISION IS INAPPROPRIATE AND PREMATURE

Finally, the recent release of the Commission’s *Triennial Review Order* strongly reinforces the view that forbearance is totally inappropriate and premature at this time. In that *Order*, the Commission reiterates its intention to initiate a TELRIC review proceeding, and affirms that Verizon’s oft-stated complaints regarding UNE pricing standards “should properly be addressed in that future [TELRIC] proceeding.”²⁸ The comments of state entities in the present proceeding emphatically agree that the RBOC pleas are misplaced and premature in these forbearance petitions.²⁹

²⁶ Comments of TexAltTel at 6-7 (emphasis in original).

²⁷ Comments of Telscape at 12.

²⁸ *Report and Order* in CC Docket No. 01-338 *et al.* (“Triennial Review Order”), FCC 03-36, rel. Aug. 21, 2003 at n. 1374; *See also id.* at n. 1365.

²⁹ *See* Comments of NARUC; CPUC at 10; NJBPU at 1; Florida PSC; Pennsylvania PUC; NYDPS at 2-3.

IV. CONCLUSION

The crystal-clear message that emerges from the comments in this proceeding – and indeed, albeit unintentionally, by the underlying petitions of Verizon and its RBOC brethren as well – is: The Supreme Court has affirmed these well-considered and statutorily based policies. The Commission is preparing to initiate a proceeding to review at least one of them. The petitioners should – and must – accept the authority of the Act, as interpreted by the Supreme Court as well as the Commission; comply with rather than incessantly resist and frustrate these rules, in their day-to-day operational as well as procedural obstruction of local competition; and prepare their best arguments for upcoming and more appropriate proceedings.

Respectfully submitted,

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